

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MARY ROE, as Guardian for JANE
DOE,

Plaintiffs,

v.

CITY OF SPOKANE, WASHINGTON, a
municipal corporation, including
its Fire Department and its
Police Department; DANIEL ROSS
and JANE DOE ROSS, husband and
wife; DETECTIVE NEIL GALLION,
SGT. JOE PETERSON; and JOHN AND
JANE DOES 1-10, husbands and
wives,

Defendants.

No. CV-06-0357-FVS

ORDER DENYING PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY
JUDGMENT, GRANTING CITY
DEFENDANTS' MOTIONS FOR
SUMMARY JUDGMENT, GRANTING
IN PART AND DENYING IN PART
DEFENDANT ROSS' MOTIONS FOR
SUMMARY JUDGMENT, DENYING, AS
MOOT, CITY DEFENDANTS'
MOTIONS TO STRIKE DECLARATION
TESTIMONY, AND GRANTING IN
PART AND DENYING IN PART
PLAINTIFFS' MOTION TO STRIKE
DECLARATION TESTIMONY

THIS MATTER came before the Court on September 3, 2008, for a hearing on Defendants' motions for summary judgment and Plaintiffs' motion for partial summary judgment. Also before the Court are the parties' motions to strike declaration testimony. J. Scott Miller appeared on behalf of Plaintiffs. Christian J. Phelps appeared on behalf of Defendants, Daniel and Jane Doe Ross. Rocco N. Treppiedi appeared on behalf of the City of Spokane and the remaining Defendants (collectively, "the City Defendants").

Following this Court's July 9, 2008 ruling on Defendants' motions to dismiss (Ct. Rec. 262), Plaintiffs remaining 42 U.S.C. § 1983 ("Section 1983") claims allege that Defendant, Daniel Ross, under color of law, infringed upon their constitutional rights by sexually

1 assaulting Jane Doe on the night of February 10, 2006, and that the
2 City Defendants' failure to supervise Mr. Ross resulted in the sexual
3 assault. They further allege that Detective Gallion and Sergeant
4 Peterson ("the officers") deprived Plaintiffs of their right to equal
5 protection under the law by deleting photographs of the alleged sexual
6 assault. Plaintiffs also continue to seek recovery under state law
7 theories of assault and battery, sexual exploitation of a child,
8 negligent infliction of emotional distress and outrage with respect to
9 Mr. Ross, negligent supervision of Mr. Ross with respect to the City
10 of Spokane ("the City"), and outrage with respect to the conduct of
11 the officers. The City Defendants move for summary judgment on all of
12 Plaintiffs' remaining claims. (Ct. Rec. 278, 279). Mr. Ross joins in
13 the City Defendants' motions for summary judgment and has filed
14 separate motions for summary judgment on all of Plaintiffs' remaining
15 claims against him. (Ct. Rec. 285, 293, 295). Plaintiffs have moved
16 for partial summary judgment on their remaining 42 U.S.C. § 1983
17 claims. (Ct. Rec. 299).

18 The Court finds that the City Defendants are entitled to summary
19 judgment on Plaintiffs' remaining federal and state causes of action.
20 While the Court finds that Mr. Ross was acting under color of state
21 law at the time of the events giving rise to this lawsuit, the facts
22 do not show, under federal law, that a City policy or custom or the
23 City's hiring, training or supervision program caused Ms. Doe to be
24 subjected to an alleged sexual assault. In addition, the officers did
25 not single out Ms. Doe or treat her differently from others similarly
26 situated. The facts do not demonstrate that the actions of the

1 officers violated Plaintiffs' right to the equal protection under the
2 law.

3 Under Washington State law, the Court finds that the undisputed
4 facts do not show that the City knew or should have known that
5 Defendant Ross would engage in sexual activity at the fire station.
6 Accordingly, the City is entitled to summary judgment on Plaintiffs'
7 claim of negligent supervision. Furthermore, while the officer's
8 order to delete Mr. Ross' digital photographs of Ms. Doe may be deemed
9 negligent, the undisputed facts demonstrate that the officers' conduct
10 was designed to protect Ms. Doe and was based on a mistaken belief of
11 the law at the time. Because the facts demonstrate that the actions
12 of the officers were not "so extreme in degree as to go beyond all
13 possible bounds of decency," summary judgment is proper on Plaintiffs'
14 outrage claim against the officers.

15 All federal and state claims remaining against the City of
16 Spokane, Detective Neil Gallion, Sergeant Joe Peterson and John and
17 Jane Does, 1-10, husbands and wives, are dismissed.

18 Plaintiffs may, however, continue to pursue this lawsuit against
19 Mr. Ross. Whether Ms. Doe was sexually assaulted at the fire station
20 by Mr. Ross is a disputed material issue. Therefore, Plaintiffs'
21 federal claim with respect to the conduct of Mr. Ross as well as the
22 Washington State law claims against Mr. Ross for assault and battery,
23 negligent infliction of emotional distress and outrage shall continue
24 to trial. However, Plaintiffs have not established a right to
25 recovery in a civil lawsuit under the Washington State criminal
26 statute for sexual exploitation of a minor when no criminal violations

1 have been pursued. Plaintiffs' sexual exploitation of a minor claim
2 is therefore dismissed.

3 BACKGROUND

4 At the time of the events that gave rise to the present action,
5 Jane Doe was 16 years old. The Defendant, Daniel Ross, was a
6 firefighter employed by the City. Am. Compl. ¶ 3.2. On February 10,
7 2006, Mr. Ross was on duty at Fire Station No. 17. Ms. Doe went to
8 Fire Station No. 17 at Mr. Ross' invitation. Am. Compl. ¶ 3.9. Mr.
9 Ross allegedly sexually assaulted Ms. Doe and took explicit
10 photographs of her. Am. Compl. ¶¶ 3.13, 3.15. After the police
11 interviewed Ms. Doe about the incident, they concluded that she had
12 consented to the sexual encounter. Detective Gallion subsequently
13 directed Mr. Ross to delete the digital photographs. Am. Compl. ¶¶
14 3.20-3.25.

15 DISCUSSION

16 **I. Legal Standard**

17 Summary judgment is appropriate only if "there is no genuine
18 issue as to any material fact and . . . the moving party is entitled
19 to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A material
20 fact is one "that might affect the outcome of the suit under the
21 governing law[.]" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248,
22 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). A fact may be considered
23 disputed if the evidence is such that the fact-finder could find that
24 the fact either existed or did not exist. See *id.* at 249, 106 S.Ct.
25 at 2511 ("all that is required is that sufficient evidence supporting
26 the claimed factual dispute be shown to require a jury . . . to

1 resolve the parties' differing versions of the truth" (quoting *First*
2 *National Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 288-89, 88
3 S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968))).

4 Here, the facts upon which the Court relies are either undisputed
5 or established by evidence that permits but one conclusion concerning
6 the fact's existence.

7 **II. Plaintiffs' Motion to Strike**

8 On August 19, 2008, Plaintiffs moved to strike various portions
9 of declarations submitted by Defendants in support of their motions
10 for summary judgment. (Ct. Rec. 400). The Court has reviewed the
11 substance of the testimony sought to be stricken, the bases provided
12 to strike the testimony and Defendants' responses. Plaintiffs have
13 primarily argued their case with their memorandum in support of their
14 motion and state general disagreement with the facts presented in the
15 declarations. (Ct. Rec. 402). Of the 75 declaration paragraphs
16 Plaintiffs seek to strike, the Court finds that Plaintiffs submit few
17 arguments which have merit. Prior to addressing the pending motions
18 for summary judgment, the Court addresses those portions of
19 declaration testimony which Plaintiffs have provided a valid basis to
20 strike.

21 **A. Declaration of Daniel Ross (Ct. Rec. 334)**

22 Plaintiffs fail to present proper grounds for striking any of the
23 contested testimony in this declaration. With regard to ¶ 24 of Mr.
24 Ross' declaration, he is the declarant of the statements and a party
25 to the suit, as is Jane Doe. Therefore, the text messaging

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1 communications between Mr. Ross and Ms. Doe on February 10, 2006, will
2 not be stricken.

3 **B. Declaration of Daniel Ross (Ct. Rec. 368)**

4 Again, Plaintiffs fail to present proper grounds for striking any
5 of the contested testimony in this declaration. Plaintiffs merely
6 disagree with the statements made. This is not a proper basis to
7 strike the testimony.

8 **C. Declaration of D.P. Van Blaricom (Ct. Rec. 340)**

9 Mr. Van Blaricom's testimony provides his opinion based upon his
10 personal knowledge. No valid basis is given to strike the statements
11 made by Mr. Van Blaricom.

12 **D. Declaration of Detective Gallion (Ct. Rec. 349)**

13 All statements made by Detective Gallion regarding Jane Doe's
14 prior cases involving sex (¶¶ 7, 11-15) appear to be in violation of
15 this Court's protective order prohibiting such evidence (Ct. Rec.
16 166). Any statements disclosing information in violation of the
17 Court's January 31, 2008 protective order shall be stricken, and those
18 statements will not be considered by the Court for purposes of the
19 instant motions for summary judgment. However, the remainder of the
20 contested testimony in this declaration is merely statements of what
21 Detective Gallion heard, saw and learned as he investigated the case.
22 This testimony is based on his personal knowledge, and Plaintiffs have
23 not provided valid grounds to strike the testimony.

24 **E. Declaration of Detective Gallion (Ct. Rec. 383)**

25 Detective Gallion's testimony regarding what he heard at the
26 deposition (portions of ¶¶ 11-13) shall be stricken and disregarded

1 for purposes of the instant motions for summary judgment. In
2 addition, ¶ 15, which discusses what Jane Doe told Officer Hager and
3 Det. Kendall, does not appear to be based on Detective Gallion's
4 personal knowledge and shall be stricken. Finally, part of ¶ 22
5 appears to be in violation of this Court's protective order
6 prohibiting evidence related to Ms. Doe's sexual history (Ct. Rec.
7 166) and shall be stricken and disregarded.

8 **F. Declaration of Detective Kendall (Ct. Rec. 366)**

9 Exhibit A (Adultfriendfinder.com website in March 2006) is
10 immaterial to this case. The exhibit is stricken. The remainder of
11 Detective Kendall's testimony is based on his personal knowledge and
12 no proper basis has been provided for it to be stricken.

13 **G. Declaration of Officer Hager (Ct. Rec. 367)**

14 Plaintiffs fail to present appropriate grounds for striking any
15 of the contested testimony contained in this declaration. Plaintiffs
16 simply disagree with Officer Hager's testimony and use their
17 memorandum as a vehicle to argue their case.

18 **III. Cross-Motions for Summary Judgment on Federal Claims**

19 **A. Defendant Ross**

20 Plaintiffs seek to establish Section 1983 liability against Mr.
21 Ross for allegedly using his position as a firefighter to lure Ms. Doe
22 to the fire station on February 10, 2006, and thereafter subject her
23 to a sexual assault. Defendant Ross argues that since he was not
24 acting under color of law when he had consensual sex with Ms. Doe, her
25 Section 1983 claim cannot stand. (Ct. Rec. 307 at 7-9).

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1 In the Ninth Circuit, a plaintiff must prove two elements to
2 state a cause of action under Section 1983: "1) that the Defendants
3 acted under color of state law; and 2) that the Defendants caused them
4 to be deprived of a right secured by the Constitution and laws of the
5 United States." *Johnson v. Knowles*, 113 F.3d 1114, 1117 (9th Cir.
6 1997).

7 **1. Acting Under Color of Law**

8 "There is no 'rigid formula' for determining whether a state or
9 local law official is acting under color of state law." *Anderson v.*
10 *Warner*, 451 F.3d 1063, 1068 (9th Cir. 2006). "Rather, it is a process
11 of 'sifting facts and weighing circumstances' which must lead us to a
12 correct determination." *McDade v. West*, 223 F.3d 1135, 1140 (9th Cir.
13 2000) (citations omitted).

14 The acts of a public official are not automatically considered to
15 be under color of law merely because he or she committed the act while
16 on duty and in uniform. *Van Ort v. Estate of Michael Stanewich*, 92
17 F.3d 831, 838 (9th Cir. 1996) (citing *Gibson v. City of Chicago*, 910
18 F.2d 1510, 1516 (7th Cir. 1990)). Instead, a government employee
19 "acts under color of state law while acting in his official capacity
20 or while exercising his responsibilities pursuant to state law."
21 *McDade*, 223 F.3d at 1140. A public employee may also act under color
22 of law when he or she takes an action in pursuit of a government
23 objective, pretends to act under color of law, or uses his or her
24 government position to "exert influence and physical control." *Van*
25 *Ort*, 92 F.3d at 838.

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1 The Ninth Circuit has identified three requirements that must be
2 satisfied in order to demonstrate that an off-duty police officer
3 acted under color of law:

4 1) The action at issue was 'performed while the officer is
5 acting, purporting, or pretending to act in the performance of
his or her official duties';

6 2) Second, the officer's pretense of acting in the performance of
7 his duties must have had the purpose and effect of influencing
the behavior of others; and

8 3) The action at issue was related in some meaningful way either
9 to the officer's governmental status or to the performance of his
duties.

10 *Anderson*, 451 F.3d at 1068-69 (citing *McDade*, 223 F.3d at 1140)).

11 The Ninth Circuit has not explicitly applied these requirements
12 to the acts of public employees who were on duty at the time of the
13 conduct at issue. However, the Ninth Circuit found that an on-duty
14 employee acted under color of law when he used his position as a
15 refugee counselor to exert influence over individuals who contacted
16 him for assistance in obtaining employment. *Vang v. Toyed*, 944 F.2d
17 476, 480 (9th Cir. 1991) (refugee counselor accused of sexually
18 assaulting the immigrants he was assigned to advise found to have
19 acted under color of law). The Ninth Circuit also found that an
20 employee of a District Attorney's Office acted under color of law when
21 she accessed a government database during working hours using a
22 computer and a password issued by her employer. *McDade*, 223 F.3d at
23 1140. The *McDade* court explained, "[b]ecause Ms. West's status as a
24 state employee enabled her to access the information, she invoked the
25 powers of her office to accomplish the offensive act." *Id.*

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1 Mr. Ross was both on-duty and in uniform at the time of the
2 sexual contact at the fire station. Although Defendants dispute that
3 Mr. Ross utilized his status as a firefighter to accomplish the sexual
4 contact, Plaintiffs allege, "Jane Doe's purpose was to meet Defendant
5 Ross in person for the first time and have a tour of Fire Station No.
6 17." Am. Compl. ¶ 3.10. Plaintiffs further allege, "Jane Doe
7 recognized that Defendant Ross was a person with special authority
8 because of his position as a uniformed firefighter, which reduced,
9 interfered with and/or prevented her capacity to resist Defendant
10 Ross' sexual assault." *Id.* ¶ 3.16. In any event, it is undisputed
11 that Mr. Ross was in uniform, on duty, and at the fire station when he
12 communicated with Ms. Doe and invited her to meet him at the fire
13 station that day.

14 Based on the facts presented, it is apparent that Mr. Ross
15 invoked the powers of his position to promote and carry out the sexual
16 conduct. Mr. Ross thus acted under color of law at the time of the
17 events that give rise to the present action.

18 **2. Deprived Ms. Doe of a Constitutional Right**

19 Regardless of the Court's finding that Mr. Ross was acting under
20 color of law during the events underlying the instant lawsuit, what
21 transpired at the fire station on February 10, 2006, is clearly a
22 disputed material issue. Plaintiffs allege and present evidence that
23 the conduct of Defendant Ross was without Jane Doe's consent and thus
24 a sexual assault. Mr. Ross contends and presents evidence that the
25 encounter was consensual sex. It is thus apparent that an issue of
26 fact exists for the jury to decide.

1 In fact, despite moving for summary judgment on the issue, the
2 responses by both Plaintiffs and Defendant Ross to the pending motions
3 for summary judgment agree that this is an issue for the jury to
4 determine. Plaintiffs concede in their response that "[i]t is clear .
5 . . . that Plaintiffs' §1983 claims against Det. Gallion, Sgt. Peterson
6 and Daniel Ross should not be decided on summary judgment, but are
7 appropriately supported and must go to trial for determination by the
8 trier of fact." (Ct. Rec. 325 at 18). Defendant Ross agrees that
9 "[w]hether [Ms. Doe] was assaulted, as she now claims, is a disputed
10 material fact." (Ct. Rec. 320 at 5). Nevertheless, as indicated
11 above, the Court finds that facts concerning the events which occurred
12 at the fire station are clearly disputed, material facts and that
13 summary judgment is thus not appropriate on Plaintiffs' Section 1983
14 claim with respect to the conduct of Defendant Ross.

15 **B. The City**

16 Plaintiffs contend that the City is liable under Section 1983
17 because the City's failure to supervise or train Mr. Ross resulted in
18 the alleged sexual assault of Ms. Doe. The City Defendants argue they
19 are not liable, as a matter of law, under Section 1983.

20 As noted above, in the Ninth Circuit, a plaintiff must prove two
21 elements to state a cause of action under Section 1983: "1) that the
22 Defendants acted under color of state law; and 2) that the Defendants
23 caused them to be deprived of a right secured by the Constitution and
24 laws of the United States." *Johnson*, 113 F.3d at 1117.

25 As indicated above, while the City Defendants assert otherwise
26 (Ct. Rec. 282 at 10-14), this Court concludes that the facts and law

1 demonstrate that Mr. Ross was acting under color of law in this case.
2 *Supra*. Given the Court's conclusions, below, the City Defendants are
3 not prejudiced by this finding.

4 **1. Vicarious Liability**

5 The City Defendants correctly assert that, under federal law,
6 vicarious liability does not attach in claims made under 42 U.S.C. §
7 1983. (Ct. Rec. 282 at 8).

8 A local government body, such as a municipality, can not be held
9 liable under Section 1983 for the unconstitutional acts of its
10 officers or employees under the theory of respondent superior. *Monell*
11 *v. New York Dep't of Social Serv.*, 436 U.S. 658, 690, 98 S. Ct. 2018,
12 2035-36, 56 L. Ed. 2d 611, 635 (1978). Rather, a municipality may
13 only be held liable under Section 1983 if the plaintiff's injuries are
14 traceable to one of the municipality's policies or customs. *Id.* "A
15 failure to train or supervise can amount to a 'policy or custom'
16 sufficient to impose liability on [a local government]." *Anderson*,
17 451 F.3d at 1070 (citing *City of Canton v. Harris*, 489 U.S. 378,
18 389-90, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989)).

19 Accordingly, as a matter of law, the City is not liable under
20 Section 1983 for the acts of Mr. Ross under a vicarious liability
21 theory.

22 **2. Policy or Custom**

23 Plaintiffs have alleged that the City's failure to supervise Mr.
24 Ross resulted in a sexual assault upon Ms. Doe. The City asserts that
25 Plaintiffs cannot show the existence of a policy or custom that caused
26 Ms. Doe's alleged constitutional deprivation, that inaction by the

1 City amounted to "deliberate indifference", or that a City policy or
2 custom was the "moving force" behind the alleged constitutional
3 deprivation. (Ct. Rec. 282 at 14-22).

4 To establish liability against the City, Plaintiffs must show
5 that (1) an employee of the City violated Plaintiffs' rights; (2) the
6 City had customs or policies that amounted to deliberate indifference;
7 and (3) these policies were the moving force behind the employee's
8 violation of Plaintiffs' constitutional rights, in the sense that the
9 City could have prevented the violation with an appropriate policy.
10 *Gibson v. County of Washoe*, 290 F.3d 1175, 1194 (9th Cir. 2002).

11 A plaintiff may recover from a municipality under section 1983 if
12 her injury was inflicted under a city policy, regulation, custom, or
13 usage. The basic rule of liability is "local governing bodies . . .
14 can be sued directly under § 1983 for monetary, declaratory, or
15 injunctive relief where . . . the action that is alleged to be
16 unconstitutional implements or executes a policy statement, ordinance,
17 regulation, or decision officially adopted and promulgated by that
18 body's officers." *Monell v. Department of Social Services*, 436 U.S.
19 658 (1978). "[A] local government may not be sued under § 1983 for an
20 injury inflicted solely by its employees or agents. Instead, it is
21 when execution of a government's policy or custom, whether made by its
22 lawmakers or by those whose edicts or acts may fairly be said to
23 represent official policy, inflicts the injury that the government as
24 an entity is responsible under § 1983." *Monell*, 436 U.S. at 694.

25 A municipality's failure to properly hire, train or supervise an
26 employee who has caused a constitutional violation can be the basis

1 for § 1983 liability where the inaction amounts to the deliberate
2 indifference to the rights of persons with whom the employee comes
3 into contact. *Canton v. Harris*, 489 U.S. 378, 388 (1989) (inadequate
4 police medical training representing a city policy may serve as basis
5 for § 1983 case). "[F]or liability to attach in this circumstance the
6 identified deficiency in a [local governmental entity's] training
7 program must be closely related to the ultimate injury." *Id.* at 391.
8 In other words, a plaintiff must show that his or her constitutional
9 "injury would have been avoided" had the governmental entity properly
10 trained its employees. *Oviatt v. Pearce*, 954 F.2d 1470, 1474 (9th
11 Cir. 1992) (citing *City of Canton*, 489 U.S. at 389-91).

12 Mr. Ross' alleged actions are entirely inconsistent with his
13 training as a fire fighter for the City. It was against City policy
14 for Mr. Ross to view a pornographic website, have sex in the fire
15 station or commit an assault. Mr. Ross' alleged conduct was contrary
16 to City policy and procedure. The City could not have prevented the
17 alleged assault with an appropriate policy.

18 Furthermore, there has been no showing of deficiencies with the
19 hiring, training or supervision of Mr. Ross. Mr. Ross' history did
20 not suggest he had a propensity to commit a sexual assault. Mr. Ross
21 had been a satisfactory employee for approximately 15 years. He did
22 not have a disciplinary or behavioral record which would indicate a
23 concern that his behavior would be violative of City policy and
24 procedure.

25 While Plaintiffs allege that the City failed to adequately
26 supervise and train Mr. Ross by allowing him to assault Ms. Doe in a

1 City fire station, there was no way for the City to know about Mr.
2 Ross' relationship with Ms. Doe or to foresee that Mr. Ross would
3 violate City policy by having a sexual encounter at a fire station.
4 All of Mr. Ross' communications with Ms. Doe were made on his personal
5 equipment. Mr. Ross never contacted Ms. Doe through any City computer
6 or internet connection, nor did Ms. Doe contact Mr. Ross in that
7 manner. It is undisputed that Mr. Ross inappropriately viewed a
8 pornographic website a number of times while on duty at the fire
9 station. However, even if the City had prior knowledge that Mr. Ross
10 was viewing the Adultfriendfinder.com website while on duty,
11 Plaintiffs have not shown a nexus between the viewing of this website
12 and an inclination to commit a sexual assault.

13 Lastly, in *Oklahoma City v. Tuttle*, 471 U.S. 808, 823-824, 105
14 S.Ct. 2427 (1985) the Supreme Court held that a municipal policy
15 sufficient to impose liability under § 1983 could not be established
16 by a single isolated instance of misconduct by a city employee. The
17 single incident alleged in this case, absent other evidence, is
18 insufficient to support liability against the City.

19 Accordingly, the Court finds, as a matter of law, that neither a
20 City policy or custom, nor the City's hiring, training or supervision
21 program caused Ms. Doe to be subjected to the alleged sexual assault.
22 The City is entitled to summary judgment on Plaintiffs' remaining
23 section 1983 claim. Plaintiffs' motion for summary judgment on this
24 claim is thus denied.

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1 **C. The Officers**

2 Plaintiffs' remaining claim for Section 1983 liability on the
3 part of the officers alleges that the deletion of digital photographs
4 by the officers deprived Plaintiffs of the equal protection under the
5 law. The parties have filed cross-motions for summary judgment on
6 this issue. However, Plaintiffs again appear to abandon their motion
7 by conceding in their response to the City Defendants' motion that
8 "[i]t is clear . . . that Plaintiffs' §1983 claims against Det.
9 Gallion, Sgt. Peterson and Daniel Ross should not be decided on
10 summary judgment, but are appropriately supported and must go to trial
11 for determination by the trier of fact." (Ct. Rec. 325 at 18).

12 The equal protection clause of the Fourteenth Amendment serves to
13 "secure every person within the State's jurisdiction against
14 intentional and arbitrary discrimination, whether occasioned by
15 express terms of a statute or by its improper execution through duly
16 constituted agents." *Village of Willowbrook v. Olech*, 528 U.S. 562,
17 564, 120 S. Ct. 1073, 1074-75, 141 L. Ed. 2d 1060, 1063 (2000).
18 Consistent with this principle, an individual may sue for denial of
19 equal protection as a "class of one." *Id.* In order to succeed upon
20 such a claim, a plaintiff must prove that he or she has been
21 "intentionally treated differently from others similarly situated and
22 that there is no rational basis for the difference in treatment." *The*
23 *Fishing Co. of Ala. v. United States*, 195 F. Supp. 2d 1239, 1254 (W.D.
24 Wash. 2002) (internal citation and quotation marks omitted).

25 Plaintiffs argue that the officers deprived Ms. Doe of equal
26 protection under the law by intentionally treating her differently

1 from other similarly situated crime victims. The City Defendants
2 contend that the evidence does not support a claim that Plaintiffs
3 were intentionally treated differently from others similarly situated
4 and that there is no rational basis for the alleged difference in
5 treatment. (Ct. Rec. 282 at 23-24).

6 It appears that the officers had a rational basis for directing
7 that the pictures be deleted in this case. As explained in Det.
8 Gallion declaration, he directed Mr. Ross to delete the pictures in
9 order to protect Ms. Doe from the dissemination of the pictures. Det.
10 Gallion's actions were taken to prevent the photographs from being
11 shown to third parties or from being published on the internet.

12 In any event, the facts and evidence demonstrate that Plaintiffs
13 were not intentionally treated differently from others similarly
14 situated. Det. Gallion and Sgt. Peterson were responsible for
15 investigating Ms. Doe's reported rape. After the officers interviewed
16 Ms. Doe about the incident, they concluded that she had consented to
17 the sexual encounter. After further investigating the alleged rape by
18 contacting Mr. Ross, Det. Gallion subsequently directed Mr. Ross to
19 delete photographs Mr. Ross admitted taking during the sexual
20 encounter. Am. Compl. ¶¶ 3.20-3.25.

21 The facts demonstrate that deletion of the pictures was based on
22 a mistaken belief of the law. Negligent destruction of the evidence
23 is not enough to support a claim under § 1983. *Harrell*, 169 F.3d at
24 431-432. As asserted by the City Defendants, Det. Gallion asked Mr.
25 Ross to delete the pictures based on a mistaken belief that he could
26 not seize the camera. He did not believe he had probable cause to

1 seize the photos because he believed the photos were not evidence of a
2 crime. In fact, Plaintiffs agree that the officers had "an inaccurate
3 and incomplete understanding of Washington statutes regarding sexual
4 exploitation of a minor" (Ct. Rec. 325 at 16). While
5 Plaintiffs assert that any reasonable police officer is on notice that
6 concealing the commission of a crime violates the victim's
7 constitutional rights, it is undisputed that the officers were not
8 aware that the digital photographs were evidence of a crime and
9 subject to seizure.

10 Regardless of whom the alleged victim was at the time, Det.
11 Gallion's actions would have been the same. Directing that the
12 digital photographs be deleted was consistent with Det. Gallion's
13 understanding of the law at that time, not based on the identity of
14 the alleged victim. Det. Gallion did not single out Ms. Doe.

15 The two cases cited by Plaintiffs in support of their argument
16 regarding violation of the equal protection clause, *Harrell v. Cook*,
17 169 F.3d 428 (7th Cir. 1999) and *Delew v. Wagner*, 143 F.3d 1219 (9th
18 Cir. 1998), are distinguishable from the instant action. Both cases
19 required the plaintiff to establish that the officer's destruction of
20 evidence was part of a conspiracy to deny the plaintiff access to the
21 courts. There has been no evidence presented which shows the officers
22 in this case conspired to deny Ms. Doe access to the court. In fact,
23 it is undisputed that the officers immediately informed everyone,
24 including Plaintiffs, that they directed Mr. Ross to delete the
25 digital photographs. The officers did not conceal or misrepresent
26 their actions in this case. Moreover, the deletion of the photographs

1 has not resulted in a denial of access to the courts. (Ct. Rec. 262
2 at 15-16).

3 The undisputed facts demonstrate that the actions of the officers
4 were not in violation of Ms. Doe's right to equal protection.
5 Plaintiffs' motion for partial summary judgment with respect to this
6 claim is denied, and the City Defendants' motion for summary judgment
7 on the § 1983 claim against the officers is granted.

8 **IV. City Defendants' Motion for Summary Judgment on State Claims**

9 **A. The City**

10 **1. Vicarious Liability**

11 The Court's ruling on Defendants' motions to dismiss held that
12 "it is clear that Mr. Ross was not acting within the scope of his
13 employment at the time that he allegedly assaulted Ms. Doe." (Ct.
14 Rec. 262 at 19); *See C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138
15 Wn.2d 699, 718-19, 985 P.2d 262, 272 (Wash. 1999) (holding churches
16 could not be held liable for acts of sexual assault committed by
17 priests); *Niece v. Elmview Group Home*, 131 Wn.2d 39, 58, 929 P.2d 420,
18 431 (1997) (holding nursing home not liable for sexual assault of
19 resident by an employee); *Thompson*, 41 Wn. App. at 554, 860 P.2d at
20 1058 (holding clinic not liable for sexual assault of patient by a
21 doctor); *Blenheim v. Dawson & Hall, Ltd.*, 35 Wn. App. 435, 440, 667
22 P.2d 125, 129 (Wash. Ct. App. 1983) (holding employer not liable for
23 sexual assault of entertainer hired to perform at company Christmas
24 party).

25 Like the defendants in *C.J.C.*, *Niece*, *Thompson*, and *Blenheim*, Mr.
26 Ross acted in pursuit of his own sexual gratification rather than in

1 an attempt to fulfill the functions of his job. The Court thus
2 determined that under the law of the state of Washington the City
3 could not be held liable for the tortious actions of Mr. Ross under a
4 theory of respondeat superior. (Ct. Rec. 262 at 19). That finding is
5 reaffirmed herein. Accordingly, as a matter of law, the City is not
6 liable for the state law tort claims regarding Mr. Ross under a theory
7 of respondeat superior.

8 **2. Negligent Supervision of Defendant Ross**

9 The City Defendants contend that summary judgment is proper with
10 respect to Plaintiffs' cause of action against the City Defendants for
11 the failure to properly supervise Mr. Ross. The City Defendants argue
12 that there can be no failure to supervise an employee's behavior when
13 no one else is aware of the employee's actions which are intentionally
14 designed to avoid detection. (Ct. Rec. 281 at 12). Plaintiffs allege
15 that the City Defendants' failure to supervise Mr. Ross was a
16 proximate cause of the alleged sexual assault. The undersigned does
17 not agree.

18 An employer has a limited duty to foreseeable victims to "prevent
19 the tasks, premises, or instrumentalities entrusted to an employee
20 from endangering others." *Niece*, 131 Wash.2d at 48, 929 P.2d at 426.
21 Consequently, an employer may be held liable for the negligent acts of
22 an employee acting outside the scope of his or her employment under a
23 negligent supervision theory when two elements are present. First,
24 the plaintiff must show that the employer knew, or, through the
25 exercise of reasonable care, should have known that the employee was
26 unfit. Second, the plaintiff must show that failing to supervise the

1 employee was a proximate cause of the plaintiff's injuries. *Betty Y.*
2 *v. Al-hellou*, 98 Wash. App. 146, 149 (Wash. Ct. App. 1999); *Crisman v.*
3 *Pierce County Fire Prot. Dist. No. 21*, 115 Wash. App. 16, 20 (2002).

4 Plaintiffs argue that the City should have known about Mr. Ross'
5 alleged dangerous tendencies or predatory practices. However, the
6 facts demonstrate that Mr. Ross did not have a history which would
7 suggest he may be sexually assaultive. Mr. Ross had been a
8 satisfactory employee for approximately 15 years. He had been
9 disciplined twice during that time, for arguing with his wife outside
10 a fire station and for failing to report to duty, but he did not have
11 any disciplinary or behavioral record to indicate a concern about his
12 behavior at a fire station or otherwise. In addition, all of Mr.
13 Ross' communications with Ms. Doe were made on his personal equipment.
14 Mr. Ross never contacted Ms. Doe through any City computer or internet
15 connection, nor did Ms. Doe contact Mr. Ross in that manner. There
16 was no way for the City to know about the private communications
17 between Mr. Ross and Ms. Doe or to foresee that Mr. Ross would violate
18 City policy by having a sexual encounter at a fire station. Even if
19 the City had prior knowledge that Mr. Ross inappropriately viewed a
20 pornographic website a number of times while on duty at the fire
21 station, Plaintiffs have not demonstrated a nexus between the viewing
22 of a pornographic website and the perpetration of a sexual assault.

23 Plaintiffs fail, as a matter of law, to establish the knowledge
24 element of this theory. There has been no evidence presented to
25 establish that the City knew or should have known Mr. Ross would
26 engage in sexual behavior at the fire station. Consequently, the

1 Court finds that the City is entitled to summary judgment on
2 Plaintiffs' claim of negligent supervision.

3 **B. The Officers**

4 The City Defendants additionally move for summary judgment on
5 Plaintiffs' claim that the officers' conduct was sufficiently
6 outrageous to impose liability on the City. (Ct. Rec. 262 at 27).
7 While the City Defendants concede that "[t]he question of whether
8 certain conduct is sufficiently outrageous is ordinarily a question
9 for the jury," *Phillips v. Hardwick*, 29 Wn. App. 382, 327 (1981), they
10 argue that if reasonable minds could not differ on whether the conduct
11 has been sufficiently extreme and outrageous to result in liability,
12 summary judgment is proper. (Ct. Rec. 282 at 14). The City
13 Defendants assert that the officers' conduct was designed to protect,
14 not harm; therefore, the conduct was hardly outrageous. In addition,
15 they argue that the deletion of the pictures did not create emotional
16 distress, let alone the "severe" distress required by law. (Ct. Rec.
17 282 at 13-17).

18 The tort of outrage has three elements in the state of
19 Washington. *Orin v. Barclay*, 272 F.3d 1207, 1219 (9th Cir. 2001).
20 First, the plaintiff must demonstrate that the defendant engaged in
21 "extreme and outrageous" conduct. Second, the plaintiff must prove
22 that the defendant intentionally or recklessly inflicted emotional
23 distress on the plaintiff. Third, the plaintiff must prove that the
24 defendant's actions actually resulted in "severe emotional distress."
25 *Id.* Conduct is outrageous when it is "so extreme in degree, as to go
26 beyond all possible bounds of decency, and to be regarded as

1 atrocious, and utterly intolerable in a civilized community." *Grimsby*
2 *v. Samson*, 85 Wash. 2d 52, 59, 530 P.2d 291, 295 (Wash. 1975).

3 The facts demonstrate that the officers' direction to Mr. Ross to
4 delete the pictures was based on a mistaken belief of the law at the
5 time. Plaintiffs do not dispute that the officers had "an inaccurate
6 and incomplete understanding of Washington statutes regarding sexual
7 exploitation of a minor" (Ct. Rec. 325 at 16). Although
8 Plaintiffs assert that the officers' outrageous conduct consists of
9 concealing the commission of a crime by deleting the pictures, it is
10 undisputed that the officers were not aware that the digital pictures
11 were evidence of a crime and thus subject to seizure. Plaintiffs are
12 not able to show more than negligence on behalf of the officers. Mere
13 negligence is not enough to establish outrage. *Fisher v. State ex*
14 *rel. Dept. of Health*, 125 Wn.App. 869, 881, 106 P.3d 836, 841 (2005)
15 (trial court properly dismissed plaintiff's claim for outrage where
16 evidence revealed, at worst, negligence on the part of government
17 agents).

18 Furthermore, although there is evidence of Ms. Doe's subsequent
19 emotional distress, Plaintiffs have not established a link between Ms.
20 Doe's alleged emotional symptoms and the actions of the officers or
21 that the symptoms stemming from Dr. Estelle's provisional diagnosis of
22 post traumatic stress disorder are sufficiently severe. Accordingly,
23 satisfaction of the second and third prongs of the tort of outrage
24 (showing an infliction of severe emotional distress) is tenuous at
25 best.

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1 Nevertheless, the undisputed facts demonstrate that the conduct
2 of Detective Gallion and Sergeant Peterson was not outrageous. The
3 Court finds that Plaintiffs' outrage claim fails as a matter of law.
4 The City Defendant's motion for summary judgment on Plaintiffs'
5 outrage claim against the officers is granted.

6 **V. Defendant Ross' Motion for Summary Judgment on State Claims**

7 **A. Assault and Battery**

8 Defendant Ross argues that since the pleadings demonstrate that
9 Ms. Doe did nothing to verbally or physically indicate a lack of
10 consent to the sexual contact, Plaintiffs are not, as a matter of law,
11 able to establish a viable claim against him for assault and battery.
12 (Ct. Rec. 311 at 10-11). Plaintiffs allege that the actions of
13 Defendant Ross at the fire station on February 10, 2006, were not
14 consented to by Ms. Doe and thus constituted an assault and battery.
15 As previously indicated, what transpired at the fire station on
16 February 10, 2006, is clearly a disputed material issue. Summary
17 judgment is therefore not proper on Plaintiffs' state law assault and
18 battery claim. Defendant Ross' motion for summary judgment on this
19 claim is denied.

20 **B. Sexual Exploitation of a Minor**

21 In addition to claiming that Plaintiffs have no right to recovery
22 under the criminal statute, Title 9.68A RCW, Defendant Ross asserts
23 that he is not liable, as a matter of law, under this theory because
24 at the time of the alleged offense he was not aware that Ms. Doe was a
25 minor. (Ct. Rec. 311 at 11). Plaintiffs assert that the acts of Mr.

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1 Ross constitute a violation of Title 9.68A RCW for the sexual
2 exploitation of a child.

3 The crime of sexual exploitation of a minor, a class B felony in
4 the state of Washington, is established by showing that a person (1)
5 compels a minor by threat or force to engage in sexually explicit
6 conduct, knowing that such conduct will be photographed or part of a
7 live performance, (2) aids, invites, employs, authorizes, or causes a
8 minor to engage in sexually explicit conduct, knowing that such
9 conduct will be photographed or part of a live performance, or (3)
10 being a parent, legal guardian, or person having custody or control of
11 a minor, permits the minor to engage in sexually explicit conduct,
12 knowing that such conduct will be photographed or part of a live
13 performance. RCW 9.68A.040.

14 No case law has been revealed which permits recovery in a civil
15 lawsuit under the criminal statute RCW 9.68A where no criminal
16 violations have been pursued, and Plaintiffs have failed to provide
17 argument or authority as to how the criminal statute is otherwise
18 applicable in this matter. While the statute provides that "[a] minor
19 prevailing in a civil action arising from **violation of this chapter** is
20 entitled to recover the costs of the suit," RCW 9.68A.130 (emphasis
21 added), it is undisputed that there has been no criminal charges or
22 violation resulting from the facts underlying this lawsuit.

23 Accordingly, although it appears that the statute contemplates a right
24 to recovery in a civil action for a violation of the criminal statute,
25 Plaintiffs have not established a right to recovery on a claim of
26 sexual exploitation of a minor based on the facts of this case.

1 Defendant Ross' motion for summary judgment on Plaintiffs' sexual
2 exploitation of a minor claim is granted and the claim is dismissed.

3 **C. Negligent Infliction of Emotional Distress**

4 Defendant Ross asserts he is entitled to summary judgment on
5 Plaintiffs' negligent infliction of emotional distress claim because
6 he only owed Ms. Doe a duty of reasonable care and Ms. Doe is not able
7 to prove emotional distress or injury through objective symptoms and
8 medical evidence. (Ct. Rec. 311 at 6-8).

9 The tort of negligent infliction of emotional distress has five
10 elements in the state of Washington. First, the plaintiff must prove
11 the four traditional elements of negligence: "duty, breach, proximate
12 cause, and damage or injury." *Snyder v. Med. Serv. Corp.*, 125 Wash.
13 2d 233, 243, 35 P.3d 1158, 1163-64 (Wash. 2001). In addition, the
14 plaintiff's emotional distress must be "manifested by objective
15 symptoms . . . susceptible to medical diagnosis and proved through
16 medical evidence." *Haubry v. Snow*, 106 Wash. App. 666, 678-679, 31
17 P.3d 1168, 1193 (Wash. Ct. App. 2001).

18 The existence of a duty of care is a question of law.
19 *Christensen v. Royal Sch. Dist.*, 156 Wn.2d 62, 67, 124 P.3d 283, 286
20 (Wash. 2005). As noted by Defendant Ross, and agreed to by Plaintiffs
21 and this Court, Mr. Ross owed a duty of reasonable care to Ms. Doe.
22 (Ct. Rec. 311 at 6; Ct. Rec. 323 at 5-6). However, there is a clear
23 disputed issue of fact with regard to the breach of the duty owed to
24 Ms. Doe. As indicated above, whether Ms. Doe was sexually assaulted
25 is a disputed material issue that must be decided by a trier of fact.
26 ///

1 Mr. Ross argues that regardless of a breach of a duty owed to
2 Plaintiff, objective evidence of Ms. Doe's subsequent emotional
3 distress is lacking. Nevertheless, Ms. Doe has received psychological
4 counseling. On May 6, 2006, Lisa Estelle, Psy.D., made a provisional
5 diagnosis of post traumatic stress disorder. Whether the actions of
6 Defendant Ross caused the harm identified by Dr. Estelle and the
7 extent of that harm is a material issue for the jury to decide with
8 respect to this claim. Accordingly, summary judgment on Plaintiffs'
9 claim of negligent infliction of emotional distress is inappropriate.

10 **D. Outrage**

11 Defendant Ross argues he is entitled to summary judgment on
12 Plaintiffs' outrage cause of action because the facts in this case
13 demonstrate that the conduct of Mr. Ross was not outrageous. (Ct.
14 Rec. 311 at 9). He asserts that the totality of the evidence
15 indicates that the sexual contact between Mr. Ross and Ms. Doe was
16 consensual. (*Id.*) This is a question for the jury to decide.

17 There is a disputed issue of material fact with respect to the
18 sexual contact between Mr. Ross and Ms. Doe. If found by a jury to be
19 a sexual assault on a 16 year old by an on-duty firefighter in a fire
20 station, reasonable minds could disagree as to whether the totality of
21 the circumstances warrant a conclusion that Defendant Ross' conduct
22 was sufficiently outrageous to establish liability. In addition, as
23 noted above, while there is evidence of Ms. Doe's subsequent emotional
24 distress, whether the actions of Defendant Ross caused the harm
25 identified by Dr. Estelle and the extent of that harm is a material
26 issue for the jury to decide. The Court thus finds it is not proper

1 to grant Defendant Ross' motion for summary judgment on Plaintiffs'
2 outrage claim.

3 **CONCLUSION**

4 The Court being fully advised, **IT IS HEREBY ORDERED:**

5 1. Plaintiffs' Motion for Partial Summary Judgment Regarding 42
6 U.S.C. § 1983 (**Ct. Rec. 299**) is **DENIED**.

7 2. The City Defendants' Motion for Summary Judgment to Dismiss
8 Remaining Federal Causes of Action (**Ct. Rec. 279**) is **GRANTED**.

9 3. The City Defendants' Motion for Summary Judgment to Dismiss
10 Remaining State Causes of Action (**Ct. Rec. 278**) is **GRANTED**.

11 4. Defendant Ross' Motion for Summary Judgment to Dismiss
12 Remaining Federal Causes of Action (**Ct. Rec. 293**) is **DENIED**.

13 5. Defendant Ross' Motion for Summary Judgment to Dismiss
14 Remaining State Causes of Action (**Ct. Rec. 295**) is **GRANTED IN PART** and
15 **DENIED IN PART**.

16 6. Defendant Ross' Motion for Summary Judgment to Dismiss
17 Remaining State Causes of Action (**Ct. Rec. 285**) is **DENIED as**
18 **duplicative of Ct. Rec. 295**.

19 7. Plaintiffs may continue to pursue their federal claim under
20 42 U.S.C. § 1983 with respect to Defendant Ross.

21 8. Plaintiff may additionally continue to pursue their state law
22 claims for assault and battery, negligent infliction of emotional
23 distress and outrage with respect to Defendant Ross.

24 9. Plaintiffs' state law claim against Defendant Ross for sexual
25 exploitation of a child is **DISMISSED**.

26 ///

ORDER . . . - 29